Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997 _____

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ — **PETITIONERS**

VERSUS

DENNIS R. SWITZER, DENNIS R. SWITZER, CPA, LTD. — **RESPONDENT**

On Petition For Writ Of Certiorari
To The Mississippi Supreme Court

PETITION FOR WRIT OF CERTIORARI

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23 pp

Before presentation of the **Questions Presented for Review**, Plaintiffs beg to elucidate by means of the following solemn assertions:

Trial of the Defendant on a complaint (June, 1985) of accounting malpractice and damage has been aborted twice, first via an erroneous directed verdict (November, 1987) and then by cessation of proceedings just before trial was to begin (May 13, 1993).

The disputed grounds which will be offered this Court by the defendant, trial court and Mississippi Supreme Court are that minutes before trial was to begin, Plaintiffs Lynn Wirtz and Charlena Wirtz ***willingly*** agreed to immediately end all their legal claims in exchange for a verbal promise of $ 18,000 (an amount arbitrarily stipulated by the trial judge). In the Opinion of the Mississippi Supreme Court it is repeated ***erroneously as fact*** that the Plaintiffs have admitted to the existence of a legally valid settlement agreement. Contrarily, the Plaintiffs have always disputed the existence of such an agreement, and it is the Mississippi court's refusal to recognize this which has resulted in the denial of the Plaintiffs' constitutional right to due process).

Additionally, the defendant, trial court and Mississippi Supreme Court have taken the position that all five Plaintiffs lost their rights of free speech concerning the Defendant's CPA licensing boards because Lynn and Charlena Wirtz "did not specifically except such a right from the (alleged, oral) settlement agreement" (affirmed Opinion and Order on Motion of Defendant's to Enforce Settlement Agreement; December 7, 1993, p. 5).

Thus, Plaintiffs respectfully submit unto this Court that the central question is whether the undisputed circumstances and specific conditions with which Lynn and Charlena Wirtz were suddenly and unexpectedly confronted on the morning of May 13, 1993, and the subsequent rulings of the Mississippi courts are in violation of their rights of due process and result in the unconstitutional infringement of their rights of free speech.

1. Do litigants have a constitutional right to participate in conferences amongst attorneys and the courts wherein oral compromise and settlement agreements are discussed and finalized and later upheld as binding upon the litigants?

2. Specifically, have the Mississippi courts taken action which displays a pattern of violation of the Plaintiffs' right to due process by denying the Plaintiffs the right to participate in conferences before the court where their case allegedly was settled and thereafter repeatedly denying the Plaintiffs the opportunity to be heard on the disputed issue of the existence and terms of the alleged settlement agreement; striking Plaintiffs' evidence from the record; falsifying the record and taking all action necessary to prevent the Plaintiffs from trying the defendant?

3. Specifically, has the Mississippi Supreme Court taken action which unconstitutionally infringes upon the Petitioners' First Amendment right of free speech by ordering that the Petitioners may not institute or pursue any claims before the Mississippi and Louisiana State Boards of Public Accountancy by imposing this term into an alleged, disputed oral compromise and settlement agreement when this term was never a justiciable issue before the trial or state courts and admittedly never mentioned in a "settlement conference" wherein the Petitioners were not allowed to participate and wherein the alleged final compromise and settlement agreement was reached?

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CITATIONS OF OPINIONS AND ORDERS

1. **OPINION AND ORDER** No. 94-CA-00040-SCT, Mississippi Supreme Court; November 6, 1997; Not designated for publication, pursuant to M.R.A.P. 35-A (See Appendix "C").

2. **ORDER** No. 94-CA-00040, Mississippi Supreme Court; April 26, 1996; Unpublished interlocutory Order (See Appendix "D").

3. **ORDER** No. 94-CA-00040, Mississippi Supreme Court; April 1, 1996; Unpublished interlocutory Order (See Appendix "E").

4. **ORDER** No. 94-CA-00040, Mississippi Supreme Court; December 13, 1995; Unpublished interlocutory Order (See Appendix "F").

5. **ORDER** No. 94-CA-00040, Mississippi Supreme Court; August 16, 1995; Unpublished interlocutory Order (See Appendix "G").

6. **ORDER** Nos. 94-CA-00040, 94-TS-00728, and 94-TS-00857; June 22, 1995; Unpublished interlocutory Order (See Appendix "H").

7. **Order on Objections to Statement of the Evidence**; Civil Action No. 5701, Circuit Court, 6th Judicial District, Adams Co., Mississippi, July 21, 1994; Unpublished trial court Order appealed to Mississippi Supreme Court and denied (See Appendices "G-K", supra).

8. **Order on Motion of Defendants/Appellees for Sanctions**; Civil Action No. 5701, Circuit Court, 6th Judicial District, Adams Co., Mississippi, June 20, 1994; Unpublished trial court Order appealed to Mississippi Supreme Court and denied (See Appendices "G-K", supra).

9. **Opinion and Order on Motion of Defendants to Enforce Settlement Agreement**; Civil Action No. 5701, Circuit Court, 6th Judicial District, Adams Co., Mississippi, December 7, 1993; Unpublished trial court Order appealed to Mississippi Supreme Court and affirmed (See Appendix "R").

10. *Wirtz v. Switzer*, 586 So.2d 775 (Miss.1991).

11. **Final Judgment;** Civil Action No. 5701, Circuit Court, 6th Judicial District, Adams Co., Mississippi, November 13, 1987; Unpublished trial court Order appealed to Mississippi Supreme Court which reversed and remanded in *Wirtz v. Switzer*.

JURISDICTION

The Mississippi Supreme Court decided this case on November 6, 1997 (See Appendix "C"). The Plaintiffs/Petitioners timely filed a Petition for Rehearing which was denied December 22, 1997 (Appendix "A,B"). 28 U.S.C. S. 1257(a) confers on this Court jurisdiction to review on a writ of certiorari the judgment of the Mississippi Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances, ***First Amendment to the Constitution of the United States.***

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law, ***Seventh Amendment to the Constitution of the United States.***

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws, ***Fourteenth Amendment to the Constitution of the United States, Section I, Article XIV.***

STATEMENT OF THE CASE

Plaintiff Charlena Wirtz, executrix of an estate, hired the defendant and local accounting firm owner Dennis R. Switzer to handle all accounting and tax advisory work for the estate. In January of 1984 he produced a report of estate assets and liabilities. This was relied upon by the executrix, her attorney and the attorney for certain heirs as the basis for a ratified final estate settlement agreement (January 3, 1984).

It was later discovered that Switzer's report showed $ 33,406 more than should have been shown as available for the heirs. Before Switzer actually calculated that figure, he estimated it at about $ 30,000 and directed Mrs. Wirtz through her attorney to withhold it from the heirs. According to the estate settlement agreement, Mrs. Wirtz was required to pay all taxes prior to the distribution of the estate assets. Pursuant to Switzer's advice, Mrs. Wirtz withheld $ 30,956 and delivered checks totaling $ 70,000.00 to the heirs' attorney along with a letter of explanation concerning the accounting error.

The attorney for the heirs disrupted the estate settlement and sued Mrs. Wirtz (February 21, 1984). The Adams County Chancery Court ordered Mrs. Wirtz to pay the $ 30,956. To settle this lawsuit, Mrs. Wirtz paid costs of litigation (February-June, 1984) plus a negotiated $ 15,000 which came from her family's personal funds, since pursuant to the estate settlement agreement, the attorney for the heirs now controlled all relevant estate funds, future income, and property.

On March 2, 1984 Mrs. Wirtz met with Switzer to discuss his accounting errors and the pending lawsuit against her. However, with his attorney present, Switzer refused to discuss the matter and disavowed all responsibility for his accounting errors and refused to assist her in any manner. When Mrs. Wirtz stated at this meeting that "this isn't fair", Switzer's attorney responded rhetorically, "show me where it's written that life has to be fair". Switzer severed all communication with his client, Mrs. Wirtz, and he did not respond to an offer she made on December 12, 1984 to settle everything in return for reimbursement of the $ 15,000 only.

On June 18, 1985 after making another attempt to avoid litigation against Switzer for her claims against him, the Wirtzes who were residuary legatees of the estate, sued Switzer (Adams County Circuit Court No. 5701).

At the first trial (November 4-5, 1987) Switzer was granted a directed verdict. The Mississippi Supreme Court of that time found sufficient judicial error to reverse and remand for new trial, but denied the Plaintiffs any opportunity to seek punitive damages or any award for their

mental anguish, *Wirtz v. Switzer*, 586 So.2d 775 (Miss.1991); September 4, 1991.

The second trial was aborted on May 13, 1993 minutes before it was to begin, and it is the circumstances and specific events which occurred during some forty-five minutes that morning, and the record of events afterwards which are now important.

Nothing was recorded that morning and no docket entry was made concerning what had occurred.

In summary, the record shows that:

For several months following May 13, 1993, Switzer's attorney litigated against the Plaintiffs on the basis of a disputed oral settlement agreement in attempts to force them to sign onto terms and conditions to which the record shows (see Appendix) they immediately and ever since have objected. Specifically, the Plaintiffs disputed that a settlement agreement was reached, but rather asserted that on May 13, 1993, the trial court had arbitrarily stipulated that they would either accept $ 18,000 or receive a directed verdict against them. Switzer alleges that an oral settlement agreement was reached that morning amongst attorneys during a settlement conference which was occurring without the Plaintiffs' being present. After the Plaintiffs' attorneys informed them that the trial court had stipulated that they would receive only $18,000 and Plaintiffs objected, the trial judge specifically denied them the opportunity to speak with him concerning the events which had transpired during the settlement conference wherein the alleged oral settlement agreement had been struck minutes before.

Although it is undisputed that no terms were discussed, even amongst attorneys and the trial judge, other than $ 18,000 in exchange for an immediate cessation of litigation, Switzer's attorney then persisted in obtaining the trial court's assistance in imposing additional terms on the Plaintiffs. Paramount of these additional terms at issue in Plaintiffs' Petition for Writ of Certiorari is the specific term enforced by the trial court and later affirmed by the Mississippi Supreme Court which precludes the Plaintiffs from communicating with the Mississippi and Louisiana State Boards of Public Accountancy about Switzer's accounting performance and professional conduct. It is undisputed that this term was never mentioned on May 13, 1993.

The Plaintiffs continually disputed the existence of any proper settlement agreement prior to Switzer's filing a motion to enforce it. However, during this dispute they offered to settle the matter for the court-stipulated $ 18,000 on the condition that Switzer's attorney cease attempts to impose the aforementioned and other unreasonable terms, never

discussed or mentioned on May 13, 1993. Switzer's attorney refused and continued to litigate in order to force the Plaintiffs to various additional terms. As on May 13, 1993, at the "hearing" on the Defendant's Motion to Enforce Settlement Agreement (August 30, 1993), the trial judge refused the Plaintiffs' requests to be heard. The trial court rendered its Opinion and Order on Defendant's Motion to Enforce Settlement Agreement on December 7, 1993. This Order was written by Switzer's attorney and signed ***verbatim*** by the trial judge, and it specifically imposed the added term that precluded the Plaintiffs from "instituting, prosecuting, or pursuing any complaint or other proceeding of any kind against the Defendants or any successor firm with the Mississippi State Board of Public Accountancy or the Louisiana State Board of Public Accountancy" (Appendix "R"; p.102). The Plaintiffs appealed to the Mississippi Supreme Court. During the following months, Switzer's attorney obtained orders from the trial court which struck numerous documents from the record which the Plaintiffs had previously designated for their appeal pursuant to M.R.A.P. 10. Several of these documents described the conditions to which Plaintiffs Lynn and Charlena Wirtz were subjected on May 13, 1993 and which they claimed to be in ***violation of their civil liberties***.

The Plaintiffs appealed these trial court orders (which struck their designated documents) to the Mississippi Supreme Court during the pendency of their principal appeal but the Mississippi Supreme Court summarily upheld these orders (see Appendices "I-K"; June 22, 1995).

On November 6, 1997 the Mississippi Supreme Court issued an Opinion wherein it found the Plaintiffs' case and arguments to be "without merit" and found all activities of the trial court to be without a "hint of impropriety".

In addition to the Mississippi Supreme Court Orders, supra, which disallowed from the record the documents designated by the Plaintiffs for their appeal, the Mississippi Supreme Court denied the Plaintiffs' Petition for Rehearing (December 22, 1997), their requests for oral argument, four requests for en banc review; and declared that its Opinion "is not designated for publication and may not be cited". (Additionally, the Mississippi Supreme Court denied the Plaintiffs' request to file an extended brief, and all motions to reconsider filed relative to the above Orders).

Pursuant to United States Supreme Court Rule 14(1)(i), the Plaintiffs hereby reference the documents contained in the Appendix wherein the federal questions sought to be reviewed were raised with a brief description of the way in which they were passed on by the Mississippi courts:

APPENDIX "Q"

1. Plaintiffs recorded that: *"We were given an ultimatum on May 13, 1993 that we would either accept $ 18,000 or that our case would be dismissed via a directed verdict in favor of Switzer"* (Appendix "Q"; p.96).

This document was filed as an attachment to the Plaintiffs' Response to Defendant's Motion to Enforce Settlement Agreement and entered into evidence at the hearing of August 30, 1993 prior to the trial court's Opinion and Order on Defendant's Motion to Enforce Settlement Agreement (December 7, 1993) which the Plaintiffs appealed to the Mississippi Supreme Court. The Plaintiffs referred the Mississippi Supreme Court to this document (CP 491) repeatedly in their principal appellate brief, reply brief, and petition for rehearing, and its truth was never rebutted. Rather, the trial court entered the statement that it was "***unaware*** of any coercion" in the Order on Defendant's Objections to Statement of the Evidence (July 21, 1994; CP 620, pp. 4-5). The Mississippi Supreme Court does not acknowledge this document. Instead, in its Opinion, it finds that the Plaintiffs' former attorney told the truth at the April 18, 1994 hearing on the Defendant's Objections to the Statement of the Evidence when he testified (at the trial judge's request) that he was unaware of any duress imposed upon the Plaintiffs on May 13, 1993. The Mississippi Supreme Court decides this, ***despite the fact that that same attorney had previously entered this document as an attachment to the Plaintiff's response, prior to the hearing of August 30, 1993 on the defendant's motion***. This document reflects throughout, the denial of the Plaintiffs due process rights by the trial court.

APPENDIX "P"

2. Following the hearing on the Defendant's Motion to Enforce Settlement Agreement (August 30, 1993), at which the trial judge refused the Plaintiffs' requests to testify and explain the grounds upon which they disputed the existence and terms of the alleged oral settlement agreement, they wrote a letter directly to the judge (September 20, 1993). In this letter the Plaintiffs state:

. . . Plaintiffs made very sure with their attorneys that neither Mr. Gamblin nor the court was asking them to give up any other rights or make any other concessions.

Plaintiffs mentioned specifically their rights to ask the Mississippi and Louisiana State Boards of Public Accountancy to investigate the defendant's accounting performance and professional conduct.

They were assured that these were not at risk, as they had not been mentioned by Mr. Gamblin.

Nor did Plaintiffs' attorneys suggest in the slightest, that Plaintiffs had any duty to offer up those rights as negotiable items, or to voluntarily forfeit them (Appendix "P"; p.92).

The Plaintiffs had no other alternative than to write the trial court judge directly because he consistently refused them an opportunity to be heard at court. Specific references are made to the unlawful attempts to infringe upon the Plaintiffs' ***right to freely communicate with Switzer's licensing boards*** throughout all of the Plaintiffs' responses to the various motions filed by Switzer's attorney. However, it was obvious that the trial judge was not considering any of the Plaintiffs' documents responding to the various motions of Switzer's attorney. In fact, the trial court signed ***verbatim***, three "opinion and orders" separately submitted by Switzer's attorney, including the Opinion and Order on the Motion of Defendant to Enforce Settlement Agreement. The trial court judge entirely ignored the recorded responses of the Plaintiffs disputing the alleged oral settlement agreement and signed all "orders" Switzer's attorney presented to him. The Mississippi Supreme Court does not acknowledge this document in its Opinion.

APPENDIX "O"

3. In this document, Appellants' Response to Defendant's Motion for Sanctions, Plaintiffs forcefully raised both the issues of duress/denial of due process and infringement of their first amendment rights of free speech concerning Switzer's licensing boards as follows:

DENIAL OF THE PLAINTIFFS' RIGHT OF FREE SPEECH TO FILE COMPLAINTS WITH THE STATE BOARDS OF PUBLIC ACCOUNTANCY

These unacceptable conditions are: (A) Effective waiver of Plaintiffs' right to submit complaints and present evidence of the defendant's accounting failures and unprofessional conduct not meeting the standards of the state boards of public accountancy in Mississippi or in Louisiana (Appendix "O"; p.76).

Long prior to May 13, 1993, defense counsel knew that the Plaintiffs had stated that they considered it a duty to file complaints with the state boards of public accountancy in Mississippi and Louisiana, (Ex. "A"). He chose, however, not to mention on May 13, 1993 any waiver of such rights.

In their Response to Defendant's Motion to Enforce Settlement Agreement, August 27, 1993, Plaintiffs explained that the wording of defense counsel's draft would obviously preclude the exercise of those rights. Defense counsel deemed their claim to be "without merit and frivolous", ("Opinion and Order", p.5); declared that Plaintiffs deserved sanctions for "recalcitrance", and then ironically included the specific conditions of waiver of rights in his "Opinion and Order", (pp.5-6) (Appendix "O"; p.79).

Defense counsel chose not to mention the waiver of such rights at the discussion among attorneys and judge on May 13, 1993. Plaintiffs' position is that as the "buyer" of such a waiver, the defendant/defense counsel had the responsibility to inform the court and the Plaintiffs' attorneys that he wanted this term to be part of the settlement. Plaintiffs, and their attorneys on May 13, 1993 and presently, believe that no obligation exists for them to sacrifice these rights, particularly since they did not instigate or encourage the discussions of May 13, 1993, and had no intention to waive those rights (Appendix "O"; p.85).

DENIAL OF DUE PROCESS

An admitted verbal submission of Plaintiffs Mr. and Mrs. Lynn Wirtz, under duress, on May 13, 1993 when their attorneys informed them that the court was giving them an ultimatum that they would either accept partial restitution, of $ 18,000.00, or see the defendant

granted a directed verdict, and "get nothing". They were also told that "the Supreme Court will affirm and you'll just be out a lot more money" (Appendix "O"; p.76).

The Plaintiffs object to the circumstances of duress which left them with no reasonable alternative other than to accept the court's ultimatum. These circumstances are attributable to the improper actions of this court, and Plaintiffs have preserved and maintained their right to appeal the trial court's actions to the Supreme Court of Mississippi, according to the Mississippi Rules of Civil Procedure and the Mississippi Supreme Court Rules, in good faith and in accordance with all ethical and legal principles (Appendix "O"; p.77).

Plaintiffs Lynn and Charlena Wirtz were isolated from all settlement discussions, and subjected to duress. Their attorneys, without even the authority from their clients to enter into a settlement agreement which the defense counsel argues was reached, served as only messengers, periodically and perhaps only partially informing the Plaintiffs as to what the trial court judge and the defense counsel were agreeing would be the final compromise and settlement agreement (Appendix "O"; p.78).

The Plaintiffs were not allowed to participate, even to the extent that they could make an offer of compromise and settlement. Rather, they were told that they were to accept immediately the $18,000.00 in return for dropping the lawsuit against the defendant, or receive a directed verdict in favor of the defendant, and therefore receive nothing. In the meantime, a jury waited, and the Plaintiffs were told by their attorneys that it was their firm belief that the Mississippi Supreme Court would not reverse the decision. Thus, the Plaintiffs were given two choices by the trial court; accept $18,000.00; or nothing, and in fact face future expense and inordinate amounts of time in attempting to combat a continuously fraudulent and unscrupulous defense.

Plaintiffs had prepared for trial and were totally shocked at the turn of events. They knew something was very wrong and demanded an explanation from their attorneys. They were told that the trial court judge had ruled that neither the testimony of their expert witness (CPA) from the prior trial nor the testimony of their recently hired expert witness (CPA) would be satisfactory. Plaintiffs herewith state that they

will challenge this action in their forthcoming appeal. (Appendix "O"; p.78).

This document was filed into the trial court on February 11, 1994 and became a referenced part of the record on appeal to the Mississippi Supreme Court (CP 530). It was entirely ignored by the trial court and was not acknowledged by the Mississippi Supreme Court on appeal.

APPENDIX "N "

4. In Petitioners' Statement of the Evidence:

> Then, the trial court judge arbitrarily declared that the Plaintiffs would either accept $18,000.00 and drop the lawsuit against the defendant, or the defendant would receive a directed verdict in his favor. This figure of $18,000.00 was arbitrarily decided upon by the trial court judge to be the value of the Plaintiffs' lawsuit, despite the fact that the Plaintiffs had the previous day worked around the clock to provide documentation of their damages at the trial court judge's own request; and this documentation which was by no means an entire account of all of the Plaintiffs' damages since it was produced on such short notice, proved damages in excess of $60,000.00 directly attributable to the defendant's accounting negligence.
>
> If this situation does not amount to duress, and does not vitiate any consent to a settlement agreement, then Plaintiffs indeed must misapprehend the meanings of those words. Even the verbal settlement agreement which was reluctantly capitulated to by the Plaintiffs under these circumstances did not include any discussion of the waiver of their rights to complain to the State Boards of Public Accountancy, or any other regulatory or professional organization, as has been discussed in other documents which the Plaintiffs have recently filed (Appendix "N"; p.74).

This document was entered at the trial court on March 7, 1994 and was stricken from the record by the trial court judge when he signed Switzer's submitted Order on Defendant's Objections to Statement of the Evidence, verbatim, June 20, 1994. Petitioners entered it as Exhibit "C" to their Brief in Support of Plaintiffs' Motion to Consolidate Appeals and Compel Transmission of Record, November 3, 1994. The Mississippi Supreme Court does not acknowledge it in its Opinion.

APPENDICES "A, L, & M"

In the interest of brevity, Petitioners will not quote further from the Appendices, with one last exception. Suffice it to say that Petitioners exhausted every legitimate legal means before the Mississippi Courts to preserve the rights herein discussed. These issues were thoroughly briefed to the Mississippi Supreme Court (See Issues #1,2,3,6,7, particularly 8, and 11; pp. 25-31; 35-38; 38-41; 48-49 where ***denial of due process*** is covered and: Issues # 5 and 9; pp. 33-35; 42-43 where ***infringement of right of free speech*** is covered). Nonetheless, without exception, the Mississippi Courts entirely dismissed Petitioners' proof and arguments without discussion or good faith legal analysis. Petitioners submit to this Court that references to the rights herein sought to be recognized are so numerous and interwoven into all of the documents included in the Appendix and many more which are not reproduced, that further proof of preservation of their review is unnecessary. Finally, Petitioner quotes from the Petition for Rehearing (Appendix "B"; p.12).

> If the activities which undeniably occurred in the trial court under Judge Richard T. Watson are to be reinforced by this Court as being fully acceptable, this fact must be generally known. However, this Court has invoked M.R.A.P. 35-A stating that this "Opinion" is not designated for publication and cannot be cited. Without question, this case satisfies the mandatory criteria for designation for publication. Firstly, this Court is establishing a new rule which has never been recognized in any court of law; namely, that parties can be prohibited by a judge from participating in settlement negotiations wherein agreements between attorneys are reached binding the parties. Secondly, this Court acknowledges that it is in the public interest for State licensing boards to review cases of professional malpractice. Thirdly, this Court is establishing a rule that the judicial system has jurisdiction to determine a person's right to bring complaints before a professional board; when it is undisputed that this claim was never submitted to the court for judicial resolution. **This kind of denial of First Amendment rights of free speech is absolutely unprecedented.**

ARGUMENT

There is no question that this is an ugly case. Petitioners have shown that throughout the record are found instances where the trial court judge threatened them without any legal justification whatsoever with:
(A) Substantial monetary sanctions if they would not sign Switzer's attorney's "Release",
(B) Vague undefined additional sanctions for the same reason,
(C) Dismissal of their case "if trial was not held for any reason attributable (sic) to Plaintiffs on May 13, 1993,
(D) Directed verdict in favor of Switzer if the Petitioners would not immediately cease litigation in exchange for the court-stipulated $ 18,000.

The trial judge accused the Petitioners of (undefined) behavior "tantamount to obstruction of justice" and effusively demonstrated his camaraderie with Switzer's attorney in open court, announcing his friendship with an executive officer of Switzer's attorney's law firm and encouraging him to take the deposition of his avowed friend Federal Judge David Bramlette, who disrupted the estate by suing Mrs. Wirtz years before. The trial court judge did everything in his power to prevent Petitioners from trying Switzer for accounting malpractice, for whatever reasons. The Mississippi Supreme Court affirmed the trial court's Orders in their entirety. In the Mississippi Supreme Court's Opinion it repeatedly misstates facts which are undisputed in the record (see Appendix "B"; Plaintiffs' Petition for Rehearing, IV SPECIFIC INACCURACIES) and throughout "finds facts" favorable to Switzer without once referencing Petitioners' documents. This is particularly evident where the Mississippi Supreme Court dismisses the Petitioners' argument that a settlement agreement was not finalized on May 13, 1993 by simply stating "Wirtz admitted that a settlement agreement was reached in the amount of $ 18,000 but denied the relinquishment of any rights to seek disciplinary action against Switzer from the Mississippi and Louisiana State Boards of Public Accountancy" (Appendix "C"; Opinion, p.8). A cursory review of Petitioners' Appendices show that ***Petitioners have always denied ever willingly entering into anything resembling a legally proper settlement agreement.***.

However, Petitioners do not seek this Court's review of these specific instances of bias attributable to the Mississippi courts. Rather, the manifestation of this bias on May 13, 1993 and subsequent efforts to enforce the trial court's Opinion and Order on Defendant's Motion to Enforce Settlement Agreement, which the Mississippi Supreme Court affirmed, is the focus of the present Petition for Writ of Certiorari.

There is no dispute in this case that Petitioners Lynn and Charlena Wirtz were unaware that a settlement conference was taking place the morning of May 13, 1993. There is no dispute that when they learned of its

occurrence, they requested permission to see the judge and were denied (Appendix "C"; Opinion). There is no dispute that the trial court judge stipulated that the Petitioners were to receive the amount of $ 18,000.00 in exchange for immediatley dropping all litigation against Switzer and that no other terms were discussed during the settlement conference. There is no dispute that no terms were put in writing and no record or docket entry exists reflecting the alleged settlement agreement.

The first question which Petitioners pose to this Court is whether they had a constitutional right to participate in the settlement conference wherein the alleged oral settlement agreement was struck. The dangerous implications of this Court's denial of this fundamental right will never be more clearly illustrated than in the present case. A fraction of the worth of Petitioner's claim against Switzer was stipulated by the trial judge and enforced through his verbal threat of an adverse directed verdict as communicated by Petitioners' attorneys and later by the "Orders" submitted by Switzer's attorney, which he signed, verbatim. Worse, even after the fact, Switzer's attorney sought and obtained conditions admittedly never mentioned during the settlement conference; namely, for example, the forfeiture of Petitioners' right to institute or initiate complaints with Switzer's licensing boards concerning his accounting malpractice and professional misconduct. If this is acceptable in state jurisdictions which have no statutory evidentiary requirements for alleged oral compromise and settlement agreements, as in Mississippi, there is literally no right to a jury trial and no guarantee of any input into settlement negotiations for litigants.

In fact, Petitioners cited ample authority that they were entitled to an evidentiary hearing on the issue of the existence of the alleged oral settlement agreement, *Callie v. Near*, 829 F.2d 888 (9th Cir.1984); *Kukla v. National Distillers Products Co.*, 483 F.2d 619, 621 (6th Cir.1973); *U.S. v. Hardage*, 982 F.2d 1491, 1496 (10th Cir.1993) (Appellants' Principal Brief, p.26; May 6, 1996). The Mississippi Supreme Court claimed that the trial court did conduct an evidentiary hearing, presumably on the August 30, 1993 hearing on the Defendant's Motion to Enforce Settlement Agreement. ***Yet, it acknowledges that the Petitioners were not allowed to testify.*** The Mississippi Supreme Court dismissed Petitioners' argument on this point referring to a failure to proffer the testimony, stating:

> If a proffer had been made, it is conceivable that the trial judge should have recused himself from an evidentiary hearing on the matter considering the nature of the charges by Wirtz of judicial interference and misconduct and the fact that the judge was a witness and participant in the alleged improprieties".

However, the issue had nothing to do with recusal. The trial court judge already had documents before him wherein the alleged oral settlement agreement was disputed (Appendices "P, Q"). The denial of Petitioners' right to testify only shows that no evidentiary hearing was conducted,

whatsoever. This state action was contrary to the legal authority cited, supra.

Finally, on this point, if courts can impose restrictions on free speech by upholding oral settlement conferences wherein litigants are excluded and afforded absolutely no say, where does this end? This case is especially ominous to future litigants because despite all the evidence which the Mississippi courts swept under the rug and ignored, they were forced to acknowledge by the persistence of Petitioners, that the term restricting their right to complain of Switzer's accounting malpractice and professional misconduct was never mentioned. This issue has not even fully played out in this case because as this Petition for Writ of Certiorari is submitted, the $18,000 sits in an account controlled by the Circuit Clerk of Adams, County, Mississippi and upon Order of the Mississippi Supreme Court, is not to be released until an "appropriate" Order is obtained. ***What other terms lay in wait for Petitioners in order to obtain even this money?***

Petitioners cite many instances which in their opinion denied them due process, supra. Petitioners have shown in the record that the trial judge forcefully confined them in isolation immediately prior to trial on May 13, 1993 and subsequently arbitrarily stipulated that they either accept $ 18,000 or an adverse directed verdict would be issued. The trial judge denied them access to the settlement negotiations and demanded an immediate response, leaving Petitioners without any reasonable alternative other than to submit. Petitioners Lynn and Charlena Wirtz were not allowed to confer with the other Petitioners and would not be allowed to try Switzer and potentially recover compensation for their damages or years of mental anguish. Subsequently, after all efforts were made to prevent trial of Switzer, the trial court judge blatantly signed "Opinion and Orders" submitted by Switzer's attorney, verbatim, which struck Petitioners' evidence from the record and imposed additional terms to the alleged settlement agreement. Perhaps worse was his continued efforts to misrepresent and even falsify the record on several occasions. But two examples found in the Opinion and Order on Defendant's Motion to Enforce Settlement Agreement are references made to falsely indicate that Petitioners Lynn and Charlena Wirtz did participate in the settlement conference and admitted the existence of the settlement agreement (pp.2,4). There are numerous more. The trial court judge called Petitioners' former attorneys to testify against them, without their prior knowledge, and those attorneys disavowed any knowledge of duress or even the existence of conditions they had previously submitted to the trial court in Plaintiffs' Response to Defendant's Motion to Enforce Settlement Agreement, to which they attached Appendix "Q". This scripted charade has been previously referred

to by Petitioners as a "sham", and they reiterate this characterization without qualification.

Finally, Petitioners address the third question presented herein their Petition for Writ of Certiorari. Specifically, has the Mississippi Supreme Court taken action which unconstitutionally infringes upon the Petitioners' First Amendment rights of free speech by ordering that the Petitioners may not institute or pursue any claims before the Mississippi and Louisiana State Boards of Public Accountancy by imposing this term into an alleged, disputed oral compromise and settlement agreement when this term was never a justiciable issue before the state court and admittedly never mentioned in a "settlement conference" wherein the Petitioners were not allowed to participate and wherein the alleged final compromise and settlement agreement was reached?

There is no question that the trial court and Mississippi Supreme Court have restricted the Petitioners' right to free speech. The Opinion and Order on Motion of Defendant to Enforce Settlement Agreement (Appendix "R"; p.102), affirmed in its entirety by the Opinion of the Mississippi Supreme Court (Appendix "C"), expressly prohibits the Petitioners from "instituting, prosecuting, or pursuing any complaint or other proceeding of any kind against the Defendants or any successor firm with the Mississippi State Board of Public Accountancy or the Louisiana State Board of Public Accountancy". The purported basis of this restriction is an alleged oral settlement agreement. Yet, the record proves and even these two "Opinions" admit, this term was never mentioned at any time on May 13, 1993; the date of the alleged settlement agreement. Overbroad does not begin to describe the Mississippi trial court or Supreme Court's "Orders"; there is no basis for the restriction, whatsoever.

As a matter of contract law, the Mississippi Supreme Court's affirmation of the trial court's order is blatantly erroneous. But more importantly for the purpose of this Petition for Writ of Certiorari, the Mississippi trial court and Supreme Court had no jurisdiction to decide claims which were never brought before them. They both fail to recognize the distinction between a "claim" at law or equity before the judiciary, and a "claim" or "complaint" issued to a professional licensing board. The Mississippi Supreme Court can indisputably determine private matters of contract law and Petitioners do not challenge the Opinion on the basis that it cannot enforce alleged oral settlement agreements. However, can the Mississippi Supreme Court or any other state court restrict free speech on the basis of an alleged oral settlement agreement when it is admitted that this restriction was never mentioned or agreed to by the parties?

The record shows that Petitioners care deeply about he practicing standards for attorneys, judges and accountants. Petitioners truly believe that not only has the Mississippi trial court and Supreme Court violated

their constitutional rights, but that their decisions bode ill for the general citizenry, at least in the state of Mississippi. Since the inception of this litigation, Petitioners have considered it a civic duty to present the evidence of Switzer's accounting malpractice and extreme unprofessional conduct to the Mississippi and Louisiana State Boards of Public Accountancy. Petitioners have undertaken no small endeavor to fulfill their duty, and they respectfully ask this Court to reverse the Mississippi Supreme Court in this case, so that their constitutional rights are restored and their efforts have not been in vain.

CONCLUSION

Petitioners believe they have brought forth relevant facts showing conditions which will be of concern to this Court. If those conditions remained unchallenged then ordinary citizens at least in Mississippi, cannot expect certified public accountants, attorneys or judges to feel bound to conduct themselves according to the rules, statutes, or canons of their professions. Nor can any individual who has been financially and reputationally damaged by negligent accounting work, expect restitution or to see court support of the state boards of Public Accountancy.

For whatever reasons, in the courts of Mississippi decorum, fair hearing and rule of law have not been available to Petitioners in this case. The five Petitioners have sought remedy not only for their personal losses of money and peace of mind but have pursued this case with increasing concern for the inarguable deterioration of practicing norms for attorneys and judiciary, ***a fact well-acknowledged by the governor of Mississippi***.

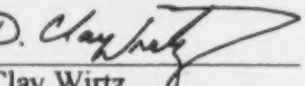
Petitioners believed this case shows two important fundamental issues which call for appropriate action by this Court, those being:

1. A pattern of rampant disregard for rules requiring conformance to truth in records produced by officers of the court.

2. A similar disregard for the rules of procedure and the fundamental constitutional rights of litigants to ***fair hearing and due process, and free speech.***

Petitioners seek from this honorable Court finally to be permitted to present the merits of their case in its entirety, arising from the Defendant's accounting malpractice and subsequent unprofessional conduct, to an unbiased court in a jury trial; nothing more.

Respectfully Submitted By:



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